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ORIGINAL
FILE

RICHARD J. ARSENAULT
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November 20, 1992

BY HAND

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Re: CC Docket No. 92-90

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Dear Ms. Searcy:

On behalf of Tandy Corporation, we are hereby filing an original and nine copies of its "Petition for Reconsideration and Request for Clarification" of the Commission's Report and Order in the above-captioned rulemaking proceeding.

Kindly date stamp the extra copy of the filing for return to my office via Messenger. If any questions arise, please contact the undersigned at 835-8010.

Sincerely,


Richard J. Arsenault

Enclosures

Q:21933-1

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Before the
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rules and Regulations Implementing) CC Docket No. 92-90
the Telephone Consumer Protection Act)
of 1991)

To: The Commission

**PETITION FOR RECONSIDERATION
AND REQUEST FOR CLARIFICATION**

Tandy Corporation ("Tandy"), by its attorneys and pursuant to Section 1.106(b)(1) of the Commission's Rules, 47 C.F.R. § 1.106(b)(1), hereby respectfully submits its Petition for Reconsideration and Request for Clarification of the Commission's Report and Order adopting rules and regulations to implement the Telephone Consumer Protection Act of 1991 ("TCPA").¹

Through more than 7,000 Radio Shack, McDuff, Computer City and other affiliated stores, Tandy is the world's largest retail distributor of consumer electronics products. Among the numerous products Tandy manufactures and sells through its distribution network are various models of facsimile machines, including some models which are not equipped to mark automatically all so-called identifying information on the facsimile message without the intervention of the machine operator. Because the Commission's Report and Order establishes a new Rule which requires facsimile machines (manufactured on or

¹ Report and Order in CC Docket No. 92-90, 57 Fed. Reg. 48,333 (Oct. 23, 1992) ("Report and Order").

after December 20, 1992) to mark certain identifying information on transmitted pages, and particularly because Tandy raised important concerns in its Reply Comments concerning this requirement which are not addressed in the Report and Order, Tandy has been compelled to file this Petition.²

I. INTRODUCTION

In its Report and Order the Commission does not address the concerns expressed by Tandy in its Reply Comments in this proceeding. As described in that pleading, proposed Section 68.318(c)(4) (now Section 68.318(c)(3)) of the Commission's Rules could be construed -- contrary to the intent of Congress -- to hold manufacturers of facsimile machines responsible for ensuring that required identifying information, i.e., the date, time, sender's identification and telephone number ("required information") be clearly marked on each transmitted page. See Report and Order at ¶ 54 & n.87 (discussion of facsimile machine requirements). For this reason alone -- although there are other equally compelling reasons as discussed below -- the Commission should reconsider its Report and Order and clarify the Facsimile Machine Rule.

II. THE FACSIMILE MACHINE RULE

Congress, through Section 227(d)(2) of the TCPA, directed the Commission to promulgate certain regulations concerning facsimile machines. Section 227(d)(2) provides:

TELEPHONE FACSIMILE MACHINES -- The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine

² See Reply Comments of Tandy Corporation (filed June 25, 1992).

which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

47 U.S.C. § 227(d)(2).

Pursuant to this statutory directive, the Commission proposed in the Notice of Proposed Rulemaking in this proceeding,³ and adopted virtually unchanged in the Report and Order, a new Section 68.318(c)(3) of its Rules which provides:

Telephone facsimile machines; identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such message clearly contains, in a margin at the top or bottom of each transmitted page or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. Telephone facsimile machines manufactured on and after December 20, 1992 must clearly mark such identifying information on each transmitted page.

Report and Order, Appendix B, § 68.318(c)(3) (emphasis added).

In its Reply Comments Tandy expressed concern about ambiguities in the proposed rule. In particular, Tandy observed "that the provision may be construed -- contrary to the legislative intent -- to hold manufacturers of facsimile machines responsible for ensuring that the required identifying information (i.e., the date, time, identification and telephone number) be clearly marked on each transmitted page." Tandy Reply Comments at 2. For that reason, Tandy

³ Notice of Proposed Rulemaking, 7 FCC Rcd 2736 (1992) ("Notice").

proposed that the last line of the proposed Rule be modified to read: "Facsimile machines manufactured on and after December 21, 1992⁴ must provide the capability to clearly mark such identifying information on each transmitted page." Id. at 4 (added text underlined).

If the suggested language had been added to the proposed Rule, the onus for a violation would clearly be on the party Congress was focusing on -- the "person" who misuses a facsimile machine, not the machine's manufacturer. However, the Commission did not address Tandy's concerns or its proposed language.

III. THE FACSIMILE MACHINE RULE REQUIRES CLARIFICATION

Despite the fact that the essence of the statutory prohibition is directed at "any person" who sends a facsimile message without the required information, the last sentence of Section 68.318(c)(3) literally requires that facsimile machines (rather than users) must automatically "clearly mark" the requisite identifying information -- irrespective of whether the user (intentionally or accidentally) misprograms the required information. Indeed, the Notice contains statements which support this interpretation both at paragraph 20 (" . . . require that any such machine which is manufactured after one year after the date of enactment of the Section clearly marks" the required information), and at paragraph 5 ("Any facsimile machine manufactured one year after the date of enactment must clearly mark this identifying information on the message.").

⁴ The Notice had used the December 21, 1992 date in the proposed Rule which was changed in the adopted Rule to December 20, 1992.

As Tandy explained in its Reply Comments, such ambiguous language in newly-adopted Section 68.318(c)(3) raises a number of critical issues; in particular, whether a facsimile machine manufacturer could be held liable when the user intentionally (or inadvertently) uses a machine's functions and capabilities to defeat the requirement that required information be included on a message. Without substantially raising the cost of typical facsimile machines, all that manufacturers reasonably can be expected to do is to equip machines with the capability to enable users to include the required information on their messages. Indeed, it does not appear to be technologically feasible to design a facsimile machine (1) which would "know" whether the required information being programmed into the machine by the user is accurate, and (2) which would cease to operate upon the input of inaccurate information.

Accordingly, Tandy urges the Commission to clarify that facsimile machine manufacturers do not have to take unreasonable steps to ensure that the required information is placed on all messages sent on their machines nor will they be held responsible for users' actions which cause inaccurate information (or no information) to be displayed on messages sent by their machines. In this regard, there are at least three areas of ambiguity with respect to the newly-adopted Rule. In order to ensure an accurate understanding of the new Rule by manufacturers of facsimile machines, Tandy respectfully requests that the Commission clarify the following:

First, and foremost, as noted above, Tandy seeks clarification on whether the new Rule only requires the manufacturer to manufacture a machine capable of providing the means for the user to input and send the date, time,

identification of sender and the telephone number of the sending facsimile machine for each message sent, as opposed to requiring inclusion of mechanisms in such machines to automatically place the required information on facsimile messages. It is Tandy's position that this is a reasonable reading of the statutory directive given the problems against which the legislation was directed. Under such a reading, whether the user utilizes the machine's capability to place the required information on each facsimile message is the responsibility of the user, not the manufacturer. Indeed, even if a machine is manufactured (at additional cost) and programmed to automatically place the required information on each page transmitted, there is virtually nothing that can be done to prevent a user from disabling the machine's program for marking each message as required.

Second, it has been suggested that, under the new Rule, manufacturers are required to include in their facsimile machines a mechanism which would automatically prevent the machine from sending a message if the user does not program the machine to mark the required information on each message. Again, Tandy believes this interpretation of the newly-adopted Rule is an extreme one which would add significant cost to the machines that Tandy (and others) manufacture. The Commission should make clear that it did not intend to place the cost burden on manufacturers (and ultimately on consumers) to eliminate activities by those who may misuse machines. Indeed, it is likely that the persons against whom the legislation was directed are not those who purchase and use Tandy machines for personal or small business use, but instead, are those who conduct large "boiler-room" abusive activities using more expensive machines.

Third, it has also been suggested that Section 68.318(c)(3) requires facsimile modem boards to automatically mark transmitted messages. Congress did not direct the Commission to establish such a requirement under the TCPA. Section 227(d)(1)(B) of the TCPA provides:

It shall be unlawful . . . to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks . . . [the required information].

47 U.S.C. § 227(d)(1)(B) (emphasis added).

The subject of this provision is clearly the "person" who must mark the required information on a message, rather than the "electronic device" (e.g., a facsimile modem board) which is used to send a message. Moreover, a facsimile modem board does not come within the statutory definition of a telephone facsimile machine which, under the TCPA, must have the capability to mark the required information on messages. The definition of a facsimile machine, by its terms, means equipment which has the capability to transcribe text, images or both, to and/or from paper -- something that a facsimile modem board is incapable of doing. Id. at § 227(a)(1)(2). As such, the Commission should clarify that Section 68.318(c)(3) only requires the user of a facsimile modem board, rather than the board itself, to mark required information on transmitted messages.

Fourth, Tandy requests clarification with respect to whether a facsimile machine must contain an internal clock (with an external time display) for automatically placing the time and date on each message. The required addition of these devices would substantially raise the retail price of many models of facsimile machines to the detriment of consumers and small businesses -- many

of whom generally do not purchase machines with such enhanced features. Again, it would be a simple matter for an operator to misuse even machines with clock and display mechanisms since the user would program these mechanisms upon receipt of the machine. Since manufacturers cannot know the date or time (or time zone) of sale or initial installation beforehand, it is illogical to hold a manufacturer liable for a user's failure to accurately program the required information even if a clock and a display device are included with the machine. Since inclusion of costly clock and display mechanisms cannot guarantee elimination of the abuses which were the focus of the TCPA, the Commission must clarify its Rule to indicate that manufacturers need not include clock and display mechanisms in their facsimile machines.

IV. THE COMMISSION SHOULD ESTABLISH A TRANSITION PERIOD TO FACILITATE COMPLIANCE WITH THE NEW RULE

Should the Commission on reconsideration adopt the onerous interpretations of the new Rule requiring the inclusion in each machine of certain mechanisms and programs so that all messages will be marked "automatically" with the required information, Tandy urges the Commission to establish a reasonable transition period (not less than 18 months, commencing on the effective date of the new Rule) before manufacturers must comply with the new Rule. This transition period is necessary to provide manufacturers sufficient time to meet the requirements of such a strict Commission interpretation of its new Rule -- particularly if that interpretation requires manufacturers to go back to the drawing board and redesign machines to include additional features. During the transition period, the required information could

be placed on the facsimile message by users rather than by the machines. In this regard, manufacturers could place a prominent notice in the packing box of each facsimile machine which explains the Commission's new Rule for marking facsimile messages and which instructs the user on how (and where) to place the required information on each message.

V. THE FACSIMILE MACHINE RULE SHOULD BE MODIFIED

Manufacturers should not be held liable when users program inaccurate required information (or no information at all) on facsimile messages. While a Commission interpretation of the new Rule to this effect would be welcome, Tandy once again proposes that Section 68.318(c)(3) should be revised to require that facsimile machines manufactured on and after December 20, 1992 only need provide the capability to clearly mark required information on each transmitted message. Tandy again suggests the following addition to the last sentence of Section 68.318(c)(3) (added text is underlined):

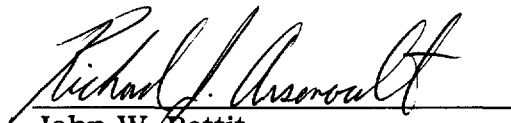
Telephone facsimile machines manufactured on and after December 20, 1992 must provide the capability to clearly mark such identifying information on each transmitted message.

VI. CONCLUSION

For the reasons stated above, Tandy respectfully requests reconsideration and clarification of the Commission's Report and Order. The Commission should reject a strict and unreasonable interpretation of its new Rule which would require the addition of several costly features to all facsimile machines. However, if such an interpretation is adopted, a reasonable transition period should be provided before compliance is required. Tandy specifically requests

that Section 68.318(c)(3) be clarified to require that facsimile machines manufactured on and after December 20, 1992 only need provide the capability to clearly mark required information on each transmitted page and that facsimile modem boards are not required to have such a capability. Finally, the Commission should expressly clarify that a manufacturer could not be held liable for a user's failure to program accurately a facsimile machine to include the required information.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard J. Arsenault", is written over a horizontal line.

John W. Pettit
Neal M. Goldberg
Richard J. Arsenault

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November 20, 1992

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